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01511 MAR 29 2001

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No. _____

In The

Supreme Court of the United States

JOSEPH C. PERNA,

Petitioner,

v.

ARCO MARINE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a seaman's Complaint asserting a Jones Act claim based on his employer's failure to furnish him a safe place to work by permitting the Captain of the vessel to intentionally inflict emotional distress upon him should be dismissed because the seaman plaintiff was not in the "zone of danger"?

Whether a seaman's Complaint asserting an unseaworthiness claim based on the Captain's being less than equal in seamanship and disposition to others in the calling as manifested by his constant harassment, belittlement, humiliation, etc. of the seaman-plaintiff should be dismissed because the seaman-plaintiff was not in the "zone of danger"?

PARTIES TO THE PROCEEDINGS

Petitioner, Joseph C. Perna, was Plaintiff and Appellant in the courts below. Respondent was Defendant and Appellee in the courts below: Arco Marine, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joseph C. Perna, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

PREVIOUS OPINIONS

The U.S. District Court dismissed Plaintiff's Complaint by an Opinion and Order dated November 29, 1999 and filed on November 30, 1999. A notice of appeal was filed on December 8, 1999. The U.S. Court of Appeals for the Third Circuit affirmed the District Court's judgment as to the Jones Act and seaworthiness claims but reversed the maintenance claim by Opinion and Order dated and filed on January 3, 2001. The District Court and Court of Appeals Opinions are unreported. On the face of the Opinion of the Court of Appeals is the notation, "Unreported/Not Precedential."

Both of the opinions are reproduced in the Appendix.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals judgment was entered on January 3, 2001. No rehearing was sought. This Petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

The District Court had jurisdiction pursuant to the Jones Act, 46 U.S.C. § 688, and the general maritime law, 28 U.S.C. § 1333. The Court of Appeals had jurisdiction

because a timely appeal was taken from a final judgment of the U.S. District Court pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

The statute involved is the Jones Act, 46 U.S.C. § 688, which reads as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Perna is a seaman who worked for Arco beginning in 1972. He started as a messman and worked his way up until he became a Steward in 1980. He has sailed as Steward on almost all of Arco's ships. The steward runs

the department responsible for housekeeping aboard the vessel and for preparing and serving the meals.

In May 1994 Perna served aboard the ARCO ALASKA as Chief Steward under the command of Captain Gray. When he first reported for duty, Captain Gray asked him to stop putting beef on the menu for budgetary reasons. The Captain wanted chicken and pasta served to the crew because they were cheaper. Perna refused the Captain's request because he wanted to give the crew as wide a variety as he could, for morale reasons. Perna then told the Chief Engineer of the Captain's request, and the Chief Engineer became annoyed.

The Captain later remonstrated with Perna for having told the Chief Engineer.

Perna also had some difficulty with an insubordinate subordinate who continued to eat shrimp after he was told he was not allowed to do so. At one point the subordinate threatened Perna with a knife and this was reported to the Captain, who refused to discipline the subordinate.

There were other incidents between the Captain and Perna during the first tour, and their relationship became strained.

At the end of Perna's first tour on June 7, 1994 he was taken to St. Mary's Hospital in Long Beach, CA after he fainted on the dock, and he was hospitalized for five days. He was suffering from job-induced stress. He then attended classes and took a vacation. In July, when Perna called the office for his next assignment, he was told he would be rejoining the ALASKA. Perna objected because

of the problems he had had with Captain Gray, but he was told that Captain Gray would not be rejoining the ship for another month or month and a half. Perna was reassigned to the ALASKA despite his expressed concern about serving under Captain Gray again and the stress it might cause to him.

Perna reported aboard the ALASKA on July 21, 1994 and Captain Devins was in command. Captain Devins remained aboard until September 2, 1994 when he gave Perna a "Superior" rating on his written evaluation form.

Captain Devins rated Perna's supervisory skills as "Excellent" and commented, "Mr. Perna has improved on his skills as the leader of the Stewards Department and has promoted 'Team Work' in his department."

When Captain Gray came aboard on September 2, 1994 he promptly met with Perna and called him a "liar" and walked away without further comment. The following day Captain Gray went to Perna's room and had a talk with him during which Captain Gray said that Perna had caused trouble for him with the "office" after their last voyage together and then threatened that he could "bust" Perna down to cook/baker.

Shortly thereafter Captain Gray began receiving "complaints" from the three persons in the Steward's Department that Perna was supervising. These were the same persons whom Perna had supervised for 42 days under Captain Devins' command, when Captain Devins rated Perna's supervisory skills as "Excellent" and lauded his effort to promote team work.

After receiving each of these individual complaints from Perna's subordinates, Captain Gray would meet

with Perna and tell him of the complaints. He would ask for Perna's version and then attempt to reconcile the two, but he was never able to do so. Captain Gray never told the subordinates to work out their problems with Perna, who was their boss, and not to bring their problems directly to him. He recognized that as Perna's supervisor he was obliged to support Perna so far as Perna's subordinates were concerned, but Captain Gray never thought that he was the problem with the subordinates.

After the first two weeks of the second tour, Captain Gray sent a message ashore as the vessel was returning from Valdez, Alaska to Long Beach, California. He said that a "situation" was developing in the Steward's Department and spreading through the department. He said "some issues include, a trust or lack thereof, perception that Perna is paranoid, a 'he said she said' approach, to concern that Joe is playing Martha (union delegate) against other department members."

In the message, Captain Gray said he was having a "credibility problem" with some of the players, and he wanted the shoreside personnel to be the "independent arbitrator." He said the problem had started in a minor way but had "mushroomed" into something much bigger because of the attitudes and actions of those involved.

Captain Gray said that both Perna and one of the subordinates had asked to be sent on vacation when the vessel arrived in Long Beach but he did not support this. He felt that as a supervisor Perna "needs to do his job instead of run away from it." He said essentially the same thing about the subordinate.

Captain Gray concluded his message by saying that in asking for shoreside involvement, he was not trying to "run away from it" but he felt he needed observations from an outside observer.

The meeting was held in Captain Gray's office on the vessel when it arrived in Long Beach, but Captain Gray did not attend.

During the second tour Captain Gray did a number of other things to Perna in addition to undercutting his authority with his subordinates. He would frequently point his finger at the menu in front of Perna's subordinates and say nothing. He would also reprimand Perna in front of his subordinates and other shipmates. He also required Perna to demonstrate equipment use during the weekly fire and boat drills even though he had announced that the job would be rotated among all of the crew members.

In front of others, the Captain complained that his room was dirty and ordered Perna to have his room cleaned daily even though the union contract called for weekly cleaning of the captain's room. Each day the captain criticized Perna for something different, and always in front of others, frequently his surbordinates.

In front of Perna's subordinates in the galley, one day Captain Gray told Perna that he had stored ammonia and Clorox in the same storeroom, which was against company regulations. Upon inspection by both, however, there was no such mixture found. Other times the Captain made Perna look like a "fool" in front of his subordinates and the rest of the crew, and he embarrassed Perna in front of the crew "all the time" in one way or another.

One day, without warning, the Captain changed the lunch break hours and ordered Perna to release his galley crew early. Perna did that and when the rest of the crew showed up for lunch, there was no one to take care of them. Perna himself did the serving.

On another day the Captain told Perna he was going "to jail" because the overtime sheet for Perna violated OPA guidelines.

At the conclusion of the tour Captain Gray evaluated Perna's performance. He observed as to meal-planning and preparation "Joe works real hard at this. He is very concerned about variety, food preparation and presentation. Food comes out hot and has eye appeal." As to Perna's culinary skills Captain Gray wrote, "Joe demonstrates high quality cooking skills. Hot and fresh are high on his list of concerns." He also observed, "Joe has a strong desire to perform well."

The Captain's criticisms dealt mostly with Perna's supervisory skills which he rated as "Unacceptable." He said, "Joe's people handling skills rapidly approach zero when anything out of the ordinary happens. He does not handle employee problems and complaints, he brings them all to me. My perception is that at times he has little or no control of his department. I have received negative comments from the other three members of his department."

As part of his overall comments, Captain Gray said, "The perception that Joe is paranoid is present in a lot of people." His overall evaluation was Marginal, which was the second lowest of five rankings.

Over the many years of his employment at Arco Perna always took great pride in getting a Superior rating, and this was his first Marginal. Just 34 days earlier Captain Devins considered Perna's managerial skills to be excellent and had rated him Superior.

In Perna's sworn Answers to Interrogatories he said that, with reference to the second voyage, "Captain Gray harassed, belittled, embarrassed and humiliated plaintiff and constantly criticized his work and held him up to ridicule in front of other crew members for the remainder of the time plaintiff remained on the vessel." At deposition Perna answered the questions put to him. There would be additional testimony of harassment, embarrassment, humiliation and criticism at trial, yet these incidents Perna was not asked about during his deposition.

Some months after leaving the ARCO ALASKA Perna suffered a nervous breakdown caused by the treatment he received from Captain Gray. Perna has been unable to work since April 14, 1995.

CAPTAIN GRAY

Captain Gray graduated from the Maine Maritime Academy in 1972 and thereafter spent his entire merchant marine career sailing for Arco. He sailed as an AB for 30 days and then sailed as Third Mate. Thereafter he progressed normally except that he failed the U.S. Coast Guard exam for Master the first time he took it.

Captains at Arco are generally placed in one of three grades. For many years Gray was in the top grade, but in

1993 he was demoted to the middle grade. This was caused by negative performance reports pertaining to his "interpersonal" skills. He was considered unapproachable. His nickname in the fleet was "Lord Jim".

On more than one occasion Perna heard Captain Gray publicly make racial slurs and understood that a Mate remonstrated with the Captain on the bridge about telling racist jokes.

Gray acknowledged under oath that a good leader would not reprimand someone in front of that person's subordinates. He said he would investigate a complaint from a subordinate only if the subordinate could not get satisfaction from his supervisor.

Gray admitted that he received complaints from Perna's subordinates early in the voyage and that he told Perna about them. Gray never told Perna's subordinates that they should take their problems to Perna and work them out with him.

During his deposition, Gray acknowledged that the things about which Perna testified did, in fact, occur, but his perception of them was different. It is fair to say that on almost every issue there was a very significant factual dispute.

PROCEEDINGS BELOW

In the District Court Arco filed a Motion for Summary Judgment which was granted as to all counts. On appeal the Court of Appeals affirmed as to the Jones Act

and unseaworthiness counts but reversed as to the maintenance and cure count.

REASONS FOR GRANTING THE PETITION

I. This Case Presents An Important But Unresolved Question of Law.

Supreme Court Rule 10(c) provides that a factor favoring certiorari is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

As discussed below, Petitioner believes that the Court of Appeals has misapplied one of this Court's decisions involving an interpretation of the FELA and has incorrectly decided an unseaworthiness issue that has not been, but should be, settled by this Court. Both of these issues are important questions of federal law.

II. The Court of Appeals erred in affirming a dismissal of Perna's Jones Act claim.

The Jones Act, 46 U.S.C. § 688, incorporates the provisions of the FELA, 45 U.S.C. § 51. Accordingly, it is undisputed that cases interpreting the FELA are equally applicable to the Jones Act. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958).

The first decision by this Court which discussed whether claims for emotional distress are "personal injury" claims and cognizable under the FELA was

Atchison, Topeka & Sante Fe Ry, Co. v. Buell, 480 U.S. 558 (1987). There, however, this Court refrained from deciding whether intentional or negligent infliction of emotional distress claims are cognizable under the FELA because the factual record had not been fleshed out sufficiently, and such a recovery "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." 480 U.S. at 568.

The case which dealt squarely with negligent infliction of emotional distress is *Consolidated Rail Corp. v. Gottschall,* 512 U.S. 532 (1994). This was a consolidation of two cases.

In *Gottschall,* the worker was forced to work under hot and humid conditions and when a fellow worker died from a heart attack, the body was simply covered and left in full view of the others in the work crew for several hours while they continued to work. Having to watch a co-worker suffer a heat seizure and die and then having to view the corpse, although covered, for several hours while being required to work caused Gottschall to suffer severe emotional distress.

In the other, *Carlisle,* the worker was forced to work long hours on an erratic basis, and the increased responsibilities attendant upon a promotion carried such stress that eventually he suffered a nervous breakdown.

This Court's holding was quite specific:

> We therefore hold that as part of its 'duty to use reasonable care in furnishing its employees with a safe place to work,' *Buell,* 480 U.S., at 558, 107 S.Ct., at 1412, a railroad has a duty under FELA

> to avoid subjecting its workers to negligently inflicted emotional injury.
>
> 512 U.S. at 550

In *Gottschall*, this Court remanded for further factual development. In *Carlisle*, however, the Court entered judgment for the defendant because "Carlisle's work-stress related claim plainly does not fall within the common law's conception of the zone of danger . . . " In particular, "the core of Carlisle's complaint was that he had been given too much – not too dangerous – work to do. That is not our idea of an FELA claim." 512 U.S. at 558.

After carefully analyzing the alternatives, this Court further held that a plaintiff can recover for emotional injury under the FELA only if he/she either "sustained a physical impact" or was "placed in immediate risk of physical harm" by reason of the employer's negligence, 512 U.S. at 547-48.

This Court dealt with the "physical impact" aspect of the test in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). Lower courts are attempting to refine the "imminent risk of physical harm" aspect. Compare *Nelson v. Metro-North Commuter R.R.*, 235 F.3d 101 (2d Cir. 2000) with *Bloom v. Consolidated Rail Corp.*, 41 F.3d 911 (3d Cir. 1994).

The "zone of danger" test, as it is sometimes called, was applied in this case to defeat Perna's claim even though Perna told both the District Court and the Court of Appeals that he was pursuing a claim for intentional infliction of emotional distress. Both courts nevertheless characterized the claim as one for negligent infliction of

emotional distress and decided it accordingly. Neither court dealt with Perna's allegation that the shipowner was negligent in overriding Perna's objections and assigning Perna to work with the same Captain who had already created great difficulties for him.

Other lower courts have also applied the "zone of danger" test to what are clearly intentional acts. *See, e.g., Nelson v. Metro-North Commuter R.R., supra,* (sexual harassment); *Williams v. Treasure Chest Casino, L.C.C.,* 1998 AMC 1300 (E.D. La. 1998) (sexual harassment); *Wiora v. Harrah's Illinois Corp.,* 2000 AMC 2250 (N.D. Ill. 1999) (invasion of privacy).

A very diligent search has failed to uncover any appellate cases which deal with the issue of whether the intentional infliction of emotional distress is compensable under the FELA or the Jones Act.

One District Court case held that even if intentional infliction of emotional distress is actionable under the Jones Act, the conduct complained of did not constitute "unconscionable abuse" or "extreme and outrageous conduct." *See Yballa v. Sea-Land Services, Inc,* 937 F.Supp. 1428 (D. Hawaii 1995).

The Court of Appeals, in a footnote in this case, suggested that Captain Gray's conduct did not meet the test for "extreme and outrageous" conduct required by the RESTATEMENT OF TORTS, SECOND, § 46. However, the Court of Appeals did not cite the illustrations in the RESTATEMENT discussion of § 46, and these are considerably less "outrageous" and "extreme" than Captain Gray's conduct. The Court of Appeals' opinion also ignored this Court's observation in *Buell* that "some

States consider the context and the relationship between the parties significant, placing special emphasis on the workplace." 480 U.S. at 568, 569. In its footnote the Court of Appeals said it was not addressing the intentional infliction of emotional distress issue.

One District Court has held that intentional infliction of emotional distress is actionable under the FELA. *Allen v. National Railroad Passenger Corp.*, 90 F.Supp. 2d 603 (E.D. Pa. 2000) citing *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985) that "the applicability of the FELA to (at least some) intentional torts is too well settled to be questioned any longer."

Perna stressed to the District Court and to the Court of Appeals that his claim was for the intentional infliction of emotional distress. The allegation that Captain Gray constantly "harassed, belittled, embarrassed and humiliated" Perna is an allegation that the captain intentionally subjected Perna to stress far beyond that inherent in a Captain's proper supervision of his subordinate department heads. Since a ship is a small community where the crew lives together 24 hours a day, the power of a Captain to rule a subordinate's life is greatly magnified since the subordinate can never escape and there is no appeal. When abused, that awesome power is unrelenting and can be extreme in the effects it causes.

In his Memorandum filed in opposition to Arco's Motion for Summary Judgment in the District Court, Perna promised to file a trial brief discussing the various standards that may be applied in an intentional infliction of emotional distress case. He asked the Court of Appeals to reverse with instructions to develop a factual record

which would enable that Court to consider an intentional infliction of emotional distress case with a full record before it.

The record before this Court has not been developed factually to a degree which would facilitate a thorough discussion of an appropriate standard for intentional infliction of emotional distress cases under the FELA and the Jones Act. The factual record is essentially the same as that in *Buell*.

It is clear that most of the lower courts are applying the "zone of danger" test to any case that involves only emotional injuries. Only this Court can give them the necessary guidance so that they can clearly recognize what is or is not actionable and what standard applies. Accordingly, petitioner is seeking to have this Court reverse the Court of Appeals with instructions that the District Court be directed to develop a full record and consider the appropriate standard to apply to an intentional infliction of emotional distress case under the Jones Act and the FELA.

III. The Court of Appeal erred in affirming a dismissal of Perna'a claim based on unseaworthiness.

Under the general maritime law a shipowner is under a legal duty to furnish its seamen with a seaworthy ship or one that is reasonably fit for the purpose intended, and this duty was first announced in *The Osceola*, 189 U.S. 158 (1903). This duty is a species of liability without fault, and it is non-delegable. *Seas Shipping Co. v. Sieracki*, 328 U.S, 85 (1946). Unseaworthiness does not depend on a finding of negligence. *Mahnich v.*

Southern S.S. Co., 321 U.S. 96 (1.944); *Alaska Steamship Co. v. Petterson*, 347 U.S. 396 (1954). It can be found even when there is a jury finding that the vessel owner was not negligent. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967). It can be found in transitory conditions that did not exist long enough for the vessel owner to have actual or constructive notice. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

As stated by this Court in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971):

> "Liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a condition, how that condition came into being – whether by negligence or otherwise is quite irrelevant to the owner's liability for the personal injuries resulting from it."

The warranty extends also to crew members, and the shipowner's obligation is to furnish a crew "equal in disposition and seamanship to the ordinary men in the calling . . . " This was first recognized by Judge Learned Hand in *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952), *cert. den.*, 343 U.S. 966 (1953) and sanctioned by this Court in *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336 (1955).

This Court has not decided what marks the boundaries of a seaman's fitness except in the *Boudoin* assault context. The lower courts have generally required the use of a deadly weapon such as a knife, *e.g., Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) or the use of something else in a savage manner, *e.g, Wiradihardja v. Bermuda Star Line*, 802 F.Supp. 989 (S.D.N.Y. 1992) (a bottle of catsup). Mere

drunken assaults are not enough, *e.g., McKinley v. Afram Lines. (USA) Co., Ltd.*, 834 F.Supp. 510 (1993), but the court there also acknowledged that a weapon need not be involved if the assailant is shown to have an "exceptionally quarrelsome nature."

In *Waldron v. Moore-McCormack Lines, Inc., supra,* this Court said that an "incompetent" seaman would render the vessel unseaworthy, but the facts of that case dealt with an inadequate number of seamen rather than an incompetent one.

Petitioner contended in the District Court that Captain Gray was considerably less than equal in disposition and seamanship to others in the calling and was prepared to offer expert testimony to this effect. However, the District Court and the Court of Appeals dismissed petitioner's unseaworthiness claim on the authority of *Szymanski v. Columbia Trans. Co.,* 154 F.3d 591 (6th Cir. 1998). Szymanski was a Jones Act/unseaworthiness case where a heart attack was said to have been caused by job-related stress. On the strength of *Gottschall* the court affirmed a summary judgment of dismissal because the seaman-plaintiff was not in the "zone of danger."

It then concluded that since there was no recovery for the injury under the Jones Act, there could also be no recovery under the unseaworthiness doctrine. It claimed to find support for this reasoning in *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990).

Petitioner submits that *Szymanski* was incorrectly decided in several respects.

In *Gottschall* this Court did not hold there could be no recovery for emotional illness; it held just the opposite. It said there could be recovery for such an injury if plaintiff-worker is in the "zone of danger" at the time the injury is suffered.

Furthermore, the *Miles* case is not authority for the rationale suggested in *Szymanski*. *Miles* was the last of three cases decided by this Court to mark the boundaries of the wrongful death action created under the general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The other two cases which also dealt with aspects of the *Moragne* wrongful death remedy are *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

Ordinarily, wrongful death law is created by statute, and items such as beneficiaries and elements of recovery are enacted at one time by the legislature. This could not be done in *Moragne* since this Court could only decide the case before it. The wrongful death remedy under the general maritime law is being fashioned on a case-by-case basis as it must be. When deciding these various elements of the newly created wrongful death remedy, this Court pays great deference to Congressional enactments and, to a lesser extent, those of the states because these are policy statements in an area which is normally one for a legislature to decide.

Accordingly, in *Miles* this Court held that a nondependent parent cannot recover for loss of society in a *Moragne* cause of action and that the general maritime law does not permit a survival action for the decedent's lost future earnings largely because such recoveries are

not permissible under the Jones Act or the Death on the High Seas Act, 46 U.S.C. §§ 761, 762.

In discussing the relationship between the Jones Act and the general maritime law, this Court noted that, "The Jones Act evinces no general hostility to recovery under maritime law." 498 U.S. at 29. Indeed, *Szymanksi* runs directly counter to the holdings in *Mahnich, Waldron* and *Mitchell,* which specifically addressed the negligence vis-a-vis unseaworthiness issue.

If *Szymanksi* is correctly decided, hereafter every judge must enter judgment in favor of the shipowner whenever a jury returns a verdict finding no negligence but unseaworthiness. The holding in *Miles* just doesn't compel that result, and it is completely contrary to the observation in *Miles* that "unseaworthiness [became] the principal vehicle for recovery by seamen, for injury or death." (citing *Moragne*) 498 U.S. at 25, 26.

Finally, in the development of the unseaworthiness remedy this Court has never focused on the injury involved; it has always stressed the need for guarding seamen's safety by requiring the condition of the vessel to be reasonably fit for the purpose intended. *Szymanski* therefore represents a radical departure from this Court's rationale for the unseaworthiness remedy which was fashioned for this Court's wards. Petitioner does not believe that whether a ship is unseaworthy should depend on the nature of the injury suffered by the seaman.

The Court of Appeals suggests that although *Miles* may not compel the result it reached, its reasoning is a logical extension of *Miles*. This is just not correct.

The "zone of danger" test cannot apply in the unseaworthiness context because every seaman injured by reason of the unseaworthiness of the vessel was in the zone of danger when he was hurt. Perna was always in the zone of danger whenever he was subjected to Captain Gray's verbal abuse. He may not have been in fear of physical harm but as to him Captain Gray's unrelenting verbal abuse made his life an abomination 24 hours a day for over one month. Even when he sought to get off after two weeks, Captain Gray would not permit that.

The decisions by this Court are replete with references to this Court's special role in the development of maritime jurisprudence in light of the constitutional grant of exclusive jurisdiction for admiralty and maritime matters to this Court in Art. III with no concomitant grant of legislative power to Congress in Art. II. Only this Court can correct the aberration in the reasoning of the court below and thereby prevent the confusion which will flow from an application of the "zone of danger" test in an area which defines the remedy in light of the condition which caused the harm rather than the nature of the harm.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue the Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully,

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UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1108

JOSEPH C. PERNA,
Appellant

v.

ARCO MARINE, INC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 97-CV-4326
District Judge: The Honorable Herbert J. Hutton

Argued: December 5, 2000

Before: BARRY, COWEN, and WOOD,* Circuit Judges

(Opinion Filed: January 3, 2001)

E. Alfred Smith, Esq. (Argued)
Second Floor
1333 Race Street
Philadelphia, Pennsylvania 19107

Attorney for Appellant

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*The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

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Attorney for Appellee

OPINION OF THE COURT

BARRY, *Circuit Judge*

I. Background

Appellant Joseph Perna worked as a steward aboard several of appellee Arco Marine's ships beginning in 1972. During 1994, Perna twice served aboard the ARCO ALASKA under Arco employee Captain Jim Gray. Perna alleges that Captain Gray frequently belittled, embarrassed, criticized, and humiliated him during these voyages. This verbal abuse, he continues, resulted in emotional injury which manifested itself by his last day of work on April 14, 1995 and left him totally disabled.

Perna filed a complaint in District Court seeking damages under three causes of action: the Jones Act, 46 U.S.C. § 688; the maritime doctrine of unseaworthiness; and maintenance and cure. On Arco's motion for summary judgment, the District Court found that Perna failed to state a cognizable claim under either the Jones Act or the doctrine of unseaworthiness. The District Court also rejected, without discussion, Perna's claim for maintenance and cure. Perna appeals to this Court, challenging

the basis for the District Court's findings on the Jones Act and unseaworthiness claims and complaining that, in any event, his maintenance and cure claim should be allowed to go forward. For the reasons which follow, we will affirm the District Court's order in part, reverse in part, and remand for further proceedings.

II. Discussion

A. Preliminary considerations

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). This Court's standard of review over a district court's grant of summary judgment is plenary. *Taylor v. Phoenixville School Dist.*, 174 F.3d 142 (3d Cir. 1999).

As a threshold matter, Arco contends that Perna "abandoned" his original complaint and never amended it to cover the emotional injury for which he now seeks damages. The record shows that Perna filed his complaint on June 30, 1997, alleging that he suffered injury "[o]n or about April 14, 1995 . . . by the negligence of the defendant . . . and the unseaworthiness of the ARCO ALASKA." He neither specified what the alleged injury was nor stated any details as to its cause. At his deposition on May 4, 1998, Perna discussed the events of April 14, 1995 and conceded that although he fell down some

stairs aboard the ARCO PRUDOE BAY that day, the accident in fact caused no injury. He went on to claim, in both his deposition and answers to interrogatories, that rather than the slip and fall case Arco originally expected, it was harassment by Captain Gray during tours of duty in 1994 which brought about his disabling emotional illness.

We agree with the District Court that any incongruities between Perna's complaint and his claim as it took shape do not add up to fatal flaws. First, the complaint clearly related to some event or events aboard the ARCO ALASKA and, therefore, could not have been about an accident on the ARCO PRUDOE BAY, as Arco imagined. Second, as the District Court noted, a plaintiff's complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ.P. 8(a)(2). The plaintiff does not have to "set out in detail the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), but must merely provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* The pleading requirements are not meant to stand in the way of a court reaching the merits of a dispute. *Lundy v. Adamar of New Jersey, Inc.* 34 F.3d 1173, 1186 (3d Cir. 1994); *see also Conley*, 355 U.S. at 48 ("The Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); 2A Moore & Lucas, Moore's Federal Practice ¶ 8.02, at 8-10 (2d ed. 1994) ("The real importance of the pleading rules is that they make pleadings, in and of themselves, relatively unimportant. Cases are to be decided on the

merits.") While Perna's complaint is surely vague, Arco recognized by the time it drafted its motion for summary judgment that Perna anchored his action on the alleged mistreatment by Captain Gray and, indeed, made arguments directly relating to his emotional injury claim.

B. The Jones Act

The Jones Act, 42 U.S.C. § 688, establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990). The Jones Act specifically provides that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 42 U.S.C. § 688. Thus, cases interpreting the FELA provide guidance for the interpretation of the Jones Act. *Fashauer v. NJ Transit Rail Operations, Inc.*, 57 F.3d 1269, 1278 n.3 (3d Cir. 1995).

The first step in deciding whether Perna's complaint states a cognizable Jones Act claim is to determine what injury Perna, in fact, alleges. Perna contends that his claim is based on the intentional infliction of emotional distress, but his complaint plainly states that he sustained personal injuries "[s]olely by reason of the negligence of the defendant and the unseaworthiness of its vessel." In Perna's brief to this Court, he again summarizes his complaint as alleging "that *Arco was negligent* in failing to provide Perna with a safe place to work, i.e. one where the Captain was able to intentionally inflict this

emotional distress on him." App. Br. at 13 (emphasis added). As the District Court found:

> Characterizing Plaintiff's claim through circular wording such as the foregoing has little effect on the Court's analysis. No matter what label Plaintiff puts on his claim, the only injury alleged is "emotional injury," which by the very terms of Plaintiff's complaint sounds in negligence.

App. at 9a.[1]

A claim of negligent infliction of emotional distress can be brought under the FELA and, thus, under the Jones Act. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S.

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[1] Whether an intentional infliction of emotional distress claim would fare better under the Jones Act has not been addressed by this Court, and we need not address it here. Even had Perna's complaint set forth such a claim, however, the facts would not support it. Intentional infliction of emotional distress requires conduct of an "extreme or outrageous type." *Cox v. Keystone Carbon, Inc.*, 861 F.2d 390, 395 (3d Cir. 1988). This Court has further noted that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997). Although it appear that Captain Gray could be difficult to work under, the petty harassment, disagreements, and insults described by Perna do not reach an extreme or outrageous level. *See* Section 46(1) of the Restatement (Second) of Torts, comment (d) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community . . . [t]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.").

532 (1994), the Supreme Court found that railroads, as part of their duty to use reasonable care in furnishing employees with a safe workplace, must avoid subjecting workers to negligently inflicted emotional injury. *Gottshall*, 512 U.S. at 550. The Court also found, however, that "an emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test." *Id.* at 555. The "zone of danger" test requires a plaintiff seeking to recover for purely emotional injuries to have suffered some physical impact or have been placed at immediate risk of physical harm by the defendant's negligence. *Consolidated Rail Corp. v. Gottshall*, 56 F.3d 530, 532 (3d Cir. 1995) (applying the "zone of danger" test after remand from the Supreme Court).

Perna fails to allege that he ever stood within any "zone of danger" or faced an "immediate risk of physical harm." *Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 915 (1994). The only cause Perna cites for his emotional illness is the behavior of Captain Gray. Moreover, the report of Dr. Stuart J. Cohen states that Perna's "major depressive episode occurred as a result of apparent mistreatment by his supervisor, Captain Gray." No other factor is mentioned. Because Perna alleges the negligent infliction of emotional distress but does not allege facts sufficient to meet the "zone of danger" test, his complaint fails to set out a cognizable case under the Jones Act. The District Court was correct in finding for Arco with respect to that claim.

C. Unseaworthiness

While the Jones Act provides an action in negligence for death or injury of a seaman, it does not disturb the seaman's long-recognized right to claim compensation for injuries resulting from "unseaworthiness." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990). Under maritime law, a shipowner must furnish a seaworthy ship. *The Osceola*, 189 U.S. 158 (1903). This duty is absolute and completely divorced from the ship owner's Jones Act duty to avoid negligent conduct. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). Seaworthiness requires not that the shipowner furnish a perfect vessel, but only one reasonably fit for its intended use. *Id.* at 550. In addition to claims resulting from physical defects in the vessel itself, courts have found ships to be unseaworthy where a dangerous or improperly trained crewmember is not "equal in disposition and seamanship to the ordinary men in the calling." *Clevenger v. Star Fish & Oyster Co.*, 325 F.2d 397, 400 (5th Cir. 1963) (quoting *Keen v. Overseas Tankship Corp.*, 194 F.2d 575, 578 (2d Cir. 1952)).

Perna argues that Arco failed to provide a seaworthy ship by installing as captain a man who was unequal to ordinary men in his calling. Arco contended, and the District Court agreed, that under the Supreme Court's holding in *Miles* any unseaworthiness claim for purely emotional injury requires that the plaintiff meet the same "zone of danger" test necessary for Jones Act claims. The *Miles* Court examined whether the Jones Act's preclusion of loss of society claims meant that such claims also failed under the unseaworthiness doctrine. The Court found that:

> [i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Miles, 498 U.S. at 32-33.

In a case directly on point, the Sixth Circuit recently found that *Miles* requires plaintiffs seeking emotional injury damages under the unseaworthiness doctrine to show that the allegedly incompetent seaman caused the plaintiff direct physical injury or placed the plaintiff in a "zone of danger." *Szymanski v. Columbia Transportation Co.*, 154 F.3d 591, 596 (6th Cir. 1998). The *Szymanski* Court found that:

> [c]onsistent with the approach of the Court in *Miles* and [*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)], we believe that the unseaworthiness action should not reach an injury that the statute does not. A seaman's claim under either the Jones Act or the unseaworthiness doctrine is fundamentally a single cause of action, and remedies under one must be congruent with remedies under the other. If no damages are permitted under the Jones Act, then an unseaworthiness claim cannot supply them either.

Szymanski, 154 F.3d at 596.

Whether *Miles* effects unseaworthiness claims for purely emotional injuries is a question of first impression in this Court. Perna contends that *Szymanski* is flawed, but we find that the Sixth Circuit's holding, if not mandated by *Miles*, certainly represents a logical extension of

Miles. As an absolute liability regime, unseaworthiness indeed encompasses more than the negligence-grounded Jones Act. It does not follow, however, that the unseaworthiness doctrine is limitless in scope. As the *Szymanski* Court noted, though the "standards for affixing liability may differ [between the Jones Act and unseaworthiness] . . . the liability must be due to a compensable injury." *Szymanski*, 154 F.3d at 596-97. In *Miles*, the Court declined to open a common-law door to compensation which Congress had closed by statute. There, the relevant injury was non-pecuniary loss. Here, it is emotional distress absent the requisite "zone of danger." Neither one is compensable under the Jones Act, and allowing either one to go forward in the guise of an unseaworthiness claim "would be inconsistent with our place in the constitutional scheme." *Miles*, 498 U.S. at 32-33.

The idea that purely emotional injury claims must be bounded in some manner is hardly controversial. As the Supreme Court noted in *Gottshall*, negligent infliction of emotional distress "holds out the very real possibility of nearly infinite and unpredictable liability . . . Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Gottshall*, 512 U.S. 546. While case law specific to purely emotional injury and unseaworthiness is not extensive, courts have generally required some type of violent physical impact. *See, e.g., Yballa v. Sea-Land Services*, 937 F. Supp. 1428, 1436 (D. Hawaii 1995) (absent some sort of physical assault on the plaintiff, unseaworthiness claim based on misconduct of fellow crewmembers not actionable as a matter of law);

Wiradihardja v. Bermuda Star Line, Inc., 802 F. Supp. 989, 994-95 (S.D.N.Y. 1992) (violent physical attack using more than fists sufficient to establish "savage and vicious nature" necessary for showing of unseaworthiness); *Walters v. Moore-McCormack Lines, Inc.*, 309 F.2d 191, 192-93 (2d Cir. 1962) (acts more savage and vicious than mere brawling needed to establish unseaworthiness) (citing *Boudoin v. Lykes Brothers S.S. Co.*, 348 U.S. 336, 340 (1955)).

Because Perna failed to allege any physical impact or "zone of danger" related to his emotional injury, the District Court was correct in finding for Arco on the unseaworthiness claim.

D. Maintenance and cure

Maintenance and cure is the "ancient right given to seamen by the maritime law," approximating a seagoing workers' compensation scheme. *O'Connell v. Interocean Management Corp.*, 90 F.3d 82, 84 (1996). "Maintenance" is a per diem allowance designed to provide seamen the compensation necessary to pay for food and lodging expenses while they recuperate ashore.[2] *Id.* "Cure" represents the cost of medical treatment. *Id.* The remedy of maintenance and cure is a contractual obligation independent of the shipowner's negligence or even the seaman's own negligence. *Id.* An employer's obligation to furnish maintenance and cure continues "until the seaman has

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[2] Most deep water seamen today are unionized, and most of the relevant collective bargaining agreements incorporate a rate of $8 per day. *Barnes v. Andover Co., L.P.*, 900 F.2d 630 (3d Cir. 1990). This Court has held that a seaman may challenge that bargained rate. *Id.*

reached the point of maximum cure, that is until the seaman is cured or his condition is diagnosed as permanent and incurable." *Id.* (citing *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 633 (3d Cir. 1990)).

The most important aspect of maintenance and cure is that, while its benefits are relatively limited its availability is relatively certain. *Barnes*, 900 F.2d at 634. "Although maintenance does not entitle a seaman to a pension or a lump-sum payment to compensate for disability or lost earning capacity, it is available in the absence of any showing of negligence or unseaworthiness, it is not reduced by a seaman's negligence, and it must be provided at the onset of the illness or injury and not only after a judicial finding of liability." *Id.* at 634. Maintenance and cure is payable regardless of whether the seaman's employment caused the injury or illness. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). An oft-cited rule states that "[a] shipowner must pay maintenance and cure for any illness or injury which occurred, was aggravated, or manifested itself while the seaman was in the ship's service." J. Norris, *The Law of Seamen*, § 26:21.

Given the broad applicability of this doctrine, the District Court was incorrect to the extent that it dismissed Perna's maintenance and cure claim based solely on the reasoning that it already found his Jones Act and unseaworthiness claims untenable. Perna need not show negligence or unseaworthiness for maintenance and cure, only injury while in service of Arco. Unlike Jones Act and unseaworthiness claims, maintenance and cure requires no "zone of danger," even for claims of purely emotional damage. *See, e.g., West v. Midland Enterprises, Inc.*, 227 F.3d

613, 617 (6th Cir. 2000) (*Gottshall-Szymanski* "zone of danger" requirement does not control maintenance and cure claims); *Nelsen v. Research Corp.*, 805 F. Supp. 837, 853 (D. Haw. 1992) (illness for purposes of maintenance and cure can include purely psychological problems). Furthermore, the Supreme Court has said "that the shipowner's liability for maintenance and cure was among the most pervasive of all and that it was not to be defeated by restrictive distinctions nor narrowly confined. When there are ambiguities or doubts, they are resolved in favor of the seaman." *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962) (citations and internal quotation marks omitted).

Viewing the facts presented thus far in the light most favorable to the non-moving party, Perna alleges that he suffered emotional injury of some sort during the time he served aboard Arco vessels. Perna concedes in his brief to this Court that Arco has paid him at least some maintenance, but alleges that Arco has refused to pay medical expenses and thus has fallen short of its maintenance and cure obligation. Whether Perna's allegations accurately represent reality is a genuine issue of material fact.

III. Conclusion

The District Court properly concluded that Perna alleges no conduct for which Arco could be liable under the Jones Act or the doctrine of unseaworthiness. The District Court erred, however, in dismissing Perna's maintenance and cure claim on a summary judgment

motion. We will, therefore, reverse only as to the maintenance and cure claim and remand for further proceedings consistent with this Opinion.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH C. PERNA,	)	CIVIL ACTION
V.	)	
	)	
ARCO MARINE, INC.	)	NO. 97-4326

MEMORANDUM AND FINAL JUDGMENT

(FILED NOV 30 1991)

HUTTON, J. November 29, 1999

Presently before the Court is Defendant's Motion for Summary Judgment (Docket No. 8) and Plaintiff's response thereto. For the reasons stated below, the Defendant's Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

In the light most favorable to the Plaintiff, the facts are as follows. Plaintiff has worked as a seaman for Defendant since 1972. In May 1994 Plaintiff served aboard the Arco Alaska as Chief Steward under the command of Captain Gray. During this tour Plaintiff's relationship with Captain Grey [sic] deteriorated due to Plaintiff's refusal to institute certain changes to the ship's menu. Following the commencement of Plaintiff's tour he was hospitalized for several days, however, he returned to the Alaska to serve another tour on July 21, 1994 under the Command of Captain Devins. During this tour, on or about September 2, 1994, Captain Devins gave Plaintiff a positive evaluation.

Following the September 2, 1994 evaluation Captain Gray returned to command of the vessel. From this point forward Plaintiff and Captain Gray were in conflict with each other. Plaintiff was disciplined by the Captain in front of his staff and subordinates, made to clean the Captain's room excessively, and required to constantly demonstrate equipment use during fire and boat drills; despite the belief that this job would be rotated. Plaintiff further alleges that Captain Grey [sic] embarked on a campaign to harass and humiliate Plaintiff. Such conduct included the failure to discipline a shipmate that allegedly threatened Plaintiff with a knife.

At the conclusion of Plaintiff's tour with Captain Grey [sic], Plaintiff received a written evaluation for the period of September 2, 1994 until October 6, 1994. Plaintiff's evaluation stated, *inter alia*, that Plaintiff's supervisory skills were unacceptable and that there was a perception that Plaintiff was paranoid. Plaintiff finished his last assignment on the Arco Purdoe Bay, on or about April 15, 1995. Since this time Plaintiff has had no gainful employment and is suffering from depression. Plaintiff files this instant action asserting "emotional illness" resulting from the harassment, belittlement, embarrassment, and humiliation inflicted upon him by Captain Grey. [sic]

II. DISCUSSION

A. Exhaustion of Remedies in the Collective Bargaining Agreement

Defendant asserts that Plaintiff's complaint should be dismissed by the Court because Plaintiff exercised his

legal remedies without first attempting to resolve his grievance under the Collective Bargaining Agreement ("CBA"). (*See* Def.'s Mot. for Summ. J. at 14). This position, however, is without merit. Generally, when determining the scope of an arbitration clause, courts operate under a "presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *See Battaglia v. McKendry*, No. CIV.A.98-5321, 1999 WL 570861, at *4 (E.D. Pa. Aug. 3, 1999) (quoting *AT & T Techs. v. Communications Workers*, 475 U.S. 643, 650 (1986)). Of course, where an agreement to arbitrate is limited in its substantive scope, courts ought not allow this " 'policy favoring arbitration . . . to override the will of the parties by giving the arbitration clause greater coverage than the parties intended.' " *Id.* (quoting *PaineWebber v. Hartmann*, 921 F.2d 507, 513 (3d Cir.1990)).

In this instant matter, Section 206.1 of the CBA states "the following procedure shall govern the . . . complaint of a Chief Steward of *unfair treatment in applying the provisions of this Agreement.*" (*See* CBA § 206.1) (emphasis added). Section 206.3 further states that "[n]o complaint or grievance shall be considered unless presented in accordance with the foregoing procedure. . . . " (*See* CBA § 206.3).

Even in light of the above mentioned provisions, the Court finds that Plaintiff is not required to arbitrate this matter because the very terms of the CBA's arbitration clause is limited to disputes concerning the unfair application or interpretation of the Agreement. (*See* CBA

§ 206.1) Plaintiff makes no such claim, rather Plaintiff's claim is for personal injury caused by Defendant's negligence and the vessels [sic] unseaworthiness. (See Pl.'s Compl. ¶ 7). The CBA makes no such reference to personal injury matters and further fails to address the possibility of, or the procedure for, resolving claims under the Jones Act or the doctrine of unseaworthiness. As such, the Court finds that there is positive assurance that the arbitration clause does not cover the current dispute and the Court must consider the merits of Plaintiffs' [sic] claim.

B. Plaintiff's Complaint

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." *Convey v. Gibson*, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party

moving for summary judgment has the initial burden of showing the basis for its motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *See id.* at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmoving party. *See Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). *cert. denied*, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. *See id.* Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. *See Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884, 890 (3d Cir. 1992).

1. **Count I – Jones Act**

Title 46, Section 688 of the United States Code states in relevant part that:

> Any seaman who shall suffer *personal injury in the course of his employment* may, at his election,

> maintain an action for damages at law, with the right of trial by jury. . . .

42 U.S.C.A. § 688 (West 1999) ("Jones Act") (emphasis added). Further, this section provides that " . . . all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . . " § 688. Thus, in interpreting a plaintiff's rights under § 688, the Court must look to cases which have interpreted the Federal Employers' Liability Act (FELA) at Title 45, Section 51 of the United States Code. *See Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1278 n.3 (3d Cir. 1995) (citing *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 401, L. Ed. 2d 382 (1958)).

As a threshold question, the Court must determine the nature of Plaintiff's "personal injury" for the purposes of the Jones Act. Only if the Court finds that such injury is one which is cognizable under the Act, can the Court consider the existence of negligence on the part of the Defendant. *See, .e.g., Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3rd Cir. 1994).

Plaintiff's complaint alleges that "[o]n or about April 14, 1995 plaintiff suffered injures while under the employment of defendant." (*See* Pl.'s Compl. ¶ 5). Plaintiff's complaint also states that "*[s]olely by reason of the negligence of the defendant* and the unseaworthiness of its vessel, plaintiff sustained personal injuries." (*See* Pl.'s Comp. ¶ 7) (emphasis added). Lastly, Plaintiff's response to Defendant's interrogatories clearly states that the only injury sustained as a result of the alleged occurrences was

"emotional illness." (*See* Pl.'s Resp. to Def.'s Interogs. ¶ 9).

Thus, it is quite evident that the only cognizable causes of action in Count I which Plaintiff has given the Defendant notice of, pursuant to Fed R. Civ. P. 8(a), is for negligent infliction of emotional distress and unseaworthiness. Despite this, Plaintiff contends that his Jones Act claim is not for negligent infliction of emotional distress, but rather for "failure to furnish plaintiff with a safe place to work in light of the history of ill will between the Captain and [Plaintiff]." (*See* Pl.'s Resp. to Def.'s Summ. J. Mot. at 12). Plaintiff further states that, "Plaintiff's claim is for negligently creating a situation which enabled . . . the Captain of [the] vessel, to intentionally inflict such emotional distress as to cause serious injuries." (*See* Pl.'s Resp. to Def.'s Summ. J. Mot. at 13).

Characterizing Plaintiff's claim through circular wording such as the foregoing, has little effect on the Court's analysis. No matter what label Plaintiff puts on his claim, the only injury alleged is "emotional injury," which by the very terms of Plaintiff's complaint sounds in negligence. (*See* Pl.'s Compl. ¶ 7).

Plaintiff attempts to characterize his claim with a form over substance argument. Despite this, even accepting Plaintiff's assertion that his claim is for "failing to furnish plaintiff with a safe place to work," the only injury Plaintiff has claimed is emotional injury based upon the negligent actions of Defendant. (*See* Pl.'s Compl. ¶ 7; *see also* Pl.'s Answers to Def.'s Interrogs. ¶¶ 2-9). Based upon Plaintiff's explanation of the events, the

Court simply cannot characterize Plaintiff's claim as anything other than one based upon Defendant's negligence for allowing emotional injury to be inflicted upon the Plaintiff. Such a claim is at its core nothing more than a claim for "negligent infliction of emotional distress."

Plaintiff makes no mention of any physical injury occurring concurrently with Defendant's negligence, nor does Plaintiff allege that Defendant's negligence caused Plaintiff to suffer later physical consequences. Plaintiff had the opportunity to state such injuries in his interrogatory answers, yet failed to do so, instead unequivocally stating without specific explanation, that the only injuries incurred were "emotional injury." (*See* Pl.'s Answers to Def.'s Interrogs. ¶ 2). Since there are no facts in the record which would allow the Court to conclude Plaintiff's injuries were actually physical in nature the Court must analyze Plaintiff's claim based upon the standards for "emotional injury" set forth by the Supreme Court and the Third Circuit.

In *Consolidated Rail Corp. v. Gottshall,* the Supreme Court held that "as part of its 'duty to use reasonable care in furnishing its employees with a safe place to work,' a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury." 512 U.S. 532, 550 (1994). However, such emotional injury did not "impose a duty to avoid creating a stressful work environment. . . . " *Id.* at 554. When a recovery for negligently inflicted emotional injury is cognizable, "workers within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* at 556. Thus, the zone of danger

test limits recovery for emotional injury resulting from a defendant's negligent conduct, notwithstanding the fact that its application will foreclose some genuine claims. *See Bloom*, 41 F.3d at 914 (citing *Gottshall*, 512 U.S. at 532). Such restriction on "emotional distress" claims equally apply to Plaintiff's claims under the Jones Act as the body of FELA jurispurdence is expressly incorporated into the Jones Act. *See Fashauer*, 57 F.3d at 1278 n.3; *see also* 42 U.S.C.A. § 688.

In the current matter, to recover for *purely* emotional injuries, as so admitted, Plaintiff must be within the zone of danger; requiring that Plaintiff suffer a physical impact or be placed in immediate risk of physical harm by Defendant's negligence. *See Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 532 (3d Cir. 1995) (applying the zone of danger test to purely emotional injuries after remand of the matter by the Supreme Court); *See also Ferguson v. CSX Transp.*, 36 F. Supp.2d 253, 256 (E.D. Pa. 1999) (finding plaintiff did not show his emotional distress was the result of the fear of immediate physical harm); *Decesare v. Nat'l R.R. Passenger Corp.*, No. CIV.A.99-129, 1999 WL 927009 (E.D. Pa. Oct. 25, 1999) (finding that plaintiff claiming emotional distress from sexual harassment did not satisfy the zone of danger requirement where there was no physical impact or immediate risk of physical harm).

Plaintiff's deposition and responses to Defendant's interrogatories reveal three potential grounds on which to assert said emotional injury. First, there is reference to a fall in which Plaintiff fell backwards on a set of stairs aboard the vessel. (*See* Perna Dep. at 235). Second, Plaintiff makes reference to an alleged incident in which a

fellow employee threatened Plaintiff with a knife. (*See* Perna Dep. at 80, 149). Third, Plaintiff asserts emotional injury resulting from harassment and humiliation by the Captain of the vessel. (*See* Pl.'s Answer to Interrogs. ¶ 2). The Court will consider the merits of each of these events in turn.

C. Plaintiff's Fall On The Steps

With respect to Plaintiff's fall, it simply cannot serve as a basis for the claimed emotional injury; despite a physical impact. First, there is no evidence or allegation in the record that said fall was the result of Defendant's negligence and second, and most importantly, Plaintiff admits in his deposition that he was not injured as a result of said fall. (*See* Perna Dep. at 235-36). Since Plaintiff claims no injury as a result of the fall, nor does he allege he suffered emotional trauma as a result, there is no genuine issue of material fact in dispute which would allow a reasonable jury to return a verdict in Plaintiff's favor.

D. The Threatening Behavior of Plaintiff's Co-Worker

With respect to the threatening behavior of Plaintiff's co-worker in which Plaintiff was allegedly threatened with a knife, Plaintiff acknowledges that there was never any physical impact. (*See* Pl.'s Dep. at 149). Therefore, to state a cognizable emotional distress claim the Plaintiff must show that his emotional injury is the result of the fear of immediate physical harm arising out of said

threat. *See Bloom*, 41 F.3d at 911 (applying the zone of danger test to emotional distress claims).

While the Third Circuit has not specifically announced the parameters required to satisfy the "fear of immediate physical harm" condition, *see, e.g., Bloom*, 41 F.3d at 915 n.4, it is clear from the established record that Plaintiff's emotional illness is not the result of such fear. The Court has examined Plaintiff's Complaint, Depositions, Answers to Interrogatories, and Affidavits in the light most favorable to the plaintiff for facts that could reasonably infer the requisite fear; but no such evidence can be located. At best the record evidences only that Plaintiff anticipated a future physical conflict.[1] Further, Plaintiff's interrogatory answers do not allege Plaintiff's emotional illness is related to any fear of such immediate

---

[1] Plaintiff's Deposition states in relevant part that:

> And I had told them before, I – you know, the guy's threatening me all the time, I told the captain a couple of times. I told the office. I told the Union. I said, He comes at me with that knife, comes near me, I'll crush his head in. So don't, you know, like – I mean, how would you like to work like that every day?

(*See* Perna Dep. at 84). Plaintiff further stated:

> Q: When you said he pulled a knife on you wasn't that a fight?
>
> A: Well, it's not a physical fight, you know. It's a threat. It's not a, you know –
>
> Q: Well, did you mention that?
>
> A: We didn't come into physical. Yeah, I told them about – well, I didn't tell the doctor about that.
>
> Q: What did you tell the doctor when you went to the hospital?

harm. Rather, Plaintiff's "emotional illness" appears to wholly revolve around the harassment and inaction of Captain Gray.[2] Lastly, the expert report supplied by Plaintiff states that "[t]his major depressive episode occurred as a result of apparent mistreatment by his supervisor, Captain Gray." (Report of Stuart J. Cohen, Ph. D.).

As such, the Court cannot locate any evidence which when viewed in the light most favorable to the Plaintiff would allow a reasonable jury to determine that the Plaintiff's emotional distress was the result of a fear of immediate physical harm from the threatening incident. This result is consistent with a recent decision in this district where the mere fact that plaintiff could have been in fear of immediate harm, was insufficient without supporting evidence in the record. *See Ferguson*, 36 F. Supp.2d at 256 (finding that plaintiff's deposition testimony clearly reveals that his emotional distress claim

---

A: Well, they ran all these tests on me and they couldn't find anything

Q: What did you tell the doctor?

A: When he asked me, you know, exactly what happened. I told him, you know, I did have problems on there with the captain, you know.

(*See* Perna Dep. at 149-50).

[2] In Defendant's interrogatory requesting an explanation of the subject matter of the suit, Plaintiff answers "Captain Grey [sic] harassed, embarrassed and humiliated plaintiff in front of other crew members. . . . Captain Grey [sic] failed to discharge or discipline a member of the Steward's Department who was insubordinate and menacing to plaintiff." (*See* Def.'s Interrogs. ¶ 2; *see also* Pl.'s Answer to Def.'s Interrogs. ¶ 2).

was not the result of fear of immediate physical harm from death threats or possibly being hit by objects projected at him).

E. Harassment, Embarrassment, Humiliation, and Inaction

Lastly, Plaintiff's claim of emotional injury resulting from the harassment, embarrassment, humiliation, and inaction of Captain Gray must be considered. From the outset, it is clear form the evidence in the record that the foregoing claims do not implicate any physical impact or threat of immediate physical harm. As such, said claims are analogous to claims based on a stressful work environment. The Supreme Court has held that such stress related claims do not state a cognizant cause of action under the FELA. *See Gottshall*, 512 U.S. at 554 (reversing the Third Circuit). Further, in a recent decision in this district the court held that emotional distress resulting from allegations of sexual harassment failed to state a claim under the FELA when there was no physical impact or threat of physical impact. *See Decesare*, 1999 WL 972009, at *4. As these restrictions on FELA claims also apply to the Jones Act, they bear directly on Plaintiff's ability to state a claim under the Act.

In the instant matter, Plaintiff does not adduce evidence, nor can any be located, that said emotional injury was the result of physical impact or a threat of immediate physical harm. Thus, in the light most favorable to the plaintiff, a reasonable jury considering Captain Gray's actions could not find that Plaintiff's claim of purely

"emotional illness" was within the requisite zone of danger as announced in *Gottshall*, 56 F.3d at 534 *See also Bloom*, 41 F.3d at 911.

As a result of the foregoing analysis, Plaintiff's claim for emotional injury resulting from his fall, his co-workers [sic] threatening behavior, and the actions of Captain Gray are not cognizable under the Jones Act. Thus, the Plaintiff has not suffered a "personal injury" within the meaning of the Act and Defendant's motion to dismiss Count I must be granted to the extend it asserts a claim of negligence under the Jones Act.

F. Count I – Unseaworthiness

The doctrine of unseaworthiness in essence imposes a nondelegable duty on a shipowner to provide seamen with a vessel that is reasonably fit for its purpose; "it is a 'species of liability without fault.' " *See Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 631 (3d Cir. 1994). Liability based upon unseaworthiness is entirely distinct from liability based upon negligence. *See Earles v. Union Barge Line Corp.*, 486 F.2d 1097, 1105 (3d. Cir. 1973). Under maritime law unseaworthiness is a condition of the vessel which is the proximate cause of the seaman's injuries. *Id.* at 1102. Such liability is imposed without regard to fault or the exercise of due care. *Id.* Unseaworthiness applies, *inter alia*, when injury is caused by a crew member that is unfit. *Id.* However, where no defective condition exists there can be no liability for unseaworthiness. *Id.*

Defendant in its motion for summary judgment asserts that like the Jones Act, Plaintiff's purely "emotional injuries" are also subject to the "zone of danger" test under the doctrine of unseaworthiness as it exists in general maritime law. (*See* Def.'s Resp. to Pl.'s Opp'n at 3). Such a restriction on the doctrine of unseaworthiness is apparently one of first impression as the Court has been unable to locate any cases within this circuit that apply the *Gottshall* "zone of danger" requirement to this doctrine. *See, e.g., Gottshall,* 56 F.3d at 534.

Nevertheless, the Sixth Circuit has recently had occasion to consider such application in *Szymanski v. Columbia Transp. Co.,* 154 F.3d 591 (6th Cir. 1998). In *Szymanski,* the court stated that "[a] seaman's claim under the Jones Act or the unseaworthiness doctrine is fundamentally a single cause of action, and the remedies under one must be congruent with the remedies under the other. If no damages are permitted under the Jones Act, then an unseaworthiness claim cannot supply them either." 154 F.3d at 569. The court further stated, "[w]hile an incompetent workman could . . . cause a ship to be unseaworthy, 'unseaworthiness" that leads only to the type of 'emotional distress' claim that we have rejected above is not unseaworthiness that entitles a seaman to compensation. The incompetent employee still must either cause some kind of direct physical injury, or place the plaintiff within the zone of danger of such injury." *Id.*

The crux of the Sixth Circuit's decision relied on the guidance of the Supreme Court in both *Gotshall,* 512 U.S. at 532, and *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990). The Supreme Court in *Miles* stated that "[t]he Jones Act evinces no general hostility to recovery under general

maritime law. It does not disturb seamen's general maritime claims for injures resulting from unseaworthiness . . . " *Miles*, 498 U.S. 29. Nevertheless, the Court limited the availability of "loss of society" damages in unseaworthiness claims in order to develop a uniform rule throughout all maritime law. *See Miles*, 498 U.S. at 33 (stating "we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."). In reaching its decision to develop such a uniform rule the Court explained that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action [unseaworthiness] in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 326.

By analogy, applying the above reasoning to the "zone of danger" requirement announced in *Gottshall*, it would be illogical to require a showing of physical injury or the threat of immediate physical harm with regard to negligence-based Jones Act claims, but not to impose an equal restriction when liability is without fault. As such, the Court is compelled to extend the "zone of danger" requirement as adopted by the Supreme Court and the Third Circuit, to cases where a plaintiff claims only emotional injury that fails to state a cognizable claim under the Jones Act because plaintiff is not within the meaning of the "zone of danger." Therefore, the Court also dismisses Plaintiff's unseaworthiness claim in Count I.

G. Count II – Admiralty

Count II of Plaintiff's complaint realleges Count I of the complaint in its entirety under the Court's Admiralty Jurisdiction. Therefore, the Court must dismiss Count II of Plaintiff's complaint consistent with the analysis already set forth in this memorandum.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH C. PERNA,	:	CIVIL ACTION
v.	:	NO. 97-4326
ARCO MARINE, INC.	:	

FINAL JUDGMENT

AND NOW, this 29th day of November, 1999, upon consideration of the Defendant's Motion for Summary Judgment (Docket No. 8), and Plaintiff's response thereto, IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that JUDGMENT is entered in favor of the Defendant and against the Plaintiff.

BY THE COURT:

/s/ Herbert J. Hutton
HERBERT J. HUTTON, J.

Supreme Court, U.S.
FILED
APR 25 2001
CLERK

(2)

No. 00-1511

In The

Supreme Court of the United States

JOSEPH C. PERNA,

Petitioner,

v.

ARCO MARINE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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19 pp

COUNTERSTATEMENT OF QUESTIONS

Whether the District Court properly granted defendant's Motion for Summary Judgment since plaintiff Joseph Perna in effect disavowed his complaint and adduced no supporting evidence for his claims?

Whether, even assuming that plaintiff-petitioner had pleaded counts sounding in emotional distress, the Court of Appeals correctly concluded that he had failed to state a cause of action because he did not allege that he suffered physical injury or was in the zone of danger thereof or any extreme Bivens-like conduct on the Captain's part?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, defendant-respondent Arco Marine, Inc. is a wholly owned subsidiary of Atlantic Richfield Company. Atlantic Richfield Company is a publicly held company that owns 100% of the stock of respondent Arco Marine, Inc.

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COUNTERSTATEMENT OF THE CASE

Perna filed a Complaint on June 30, 1997, under the Jones Act referring to a personal injury allegedly sustained on April 14, 1995, on defendant's vessel. However, he later testified at his deposition that he had not been hurt.

After the statute of limitations had run, in his Answers to Interrogatories filed February 13, 1998, Petitioner varied from the allegations of his complaint to an earlier period of time that was barred by the statute of limitations; namely, May 1994, when, allegedly, Captain Gray had harassed, embarrassed and humiliated him aboard the ARCO ALASKA and failed to discharge or discipline a member of the Steward's Department who was insubordinate. He charged also for the first time that Captain Gray had humiliated him on a later trip on board the ARCO ALASKA in October 1994, and given him a poor evaluation. This charge was also barred by the statute of limitation. However, Petitioner understandably never moved to amend his Complaint to include these time-barred allegations.

On June 10, 1999, Arco moved for Summary Judgment. Arco noted that Perna had testified that he alone was responsible for the mishap of April 14, 1995, and in any event had not injured himself. As to Perna's other alleged injuries outside the Complaint and Statute of Limitations defendant noted that a claim for emotional distress attributed to work-related stress is not permitted. On November 30, 1999, the District Court granted defendant's Motion and dismissed the Complaint.

On January 3, 2001, the Third Circuit held that the District Court properly concluded that Perna alleged no conduct for which Arco could be liable under the Jones Act or the doctrine of unseaworthiness but had erred in dismissing the maintenance and cure claim on summary judgment and so remanded for further proceedings.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF EMOTIONAL INJURY (NOT IN HIS COMPLAINT) FAILED TO QUALIFY AS A COMPENSABLE INJURY UNDER THE *CARLISLE-GOTTSCHALL* TEST.

At the outset, it must be noted that plaintiff's complaint (see Appendix) referred only to injuries plaintiff suffered on April 14, 1995. However, at his deposition on May 4, 1998 (although identifying the specific incident on a ladder that occurred on April 14, 1995 which apparently he had had in mind when filing his Complaint), he stated he had not been injured. In effect, he disavowed his Complaint when he testified:

> Q. What were you doing at the time?
>
> A. We were down in the storerooms . . . The vice-chairman of the union came down to talk to me.
>
> Q. Where did you fall down? What particular location of the ship?
>
> A. We were down in the storage. We were going to go up to my room. And he went up ahead of me. I had to get something. And I

> tried to – you know, I skipped a few steps. I guess I jumped on the second or third and that's all I remember. I was – you know, I wanted to get up. We started talking about the evaluation. I guess I was raving and ranting.
>
> Q. And what did you – you were coming up, taking two steps at a time?
>
> A. Yeah. I hit the first two steps or something like that . . . I fell backwards . . . I guess I didn't get hurt . . .
>
> Q. Were you injured in the fall?
>
> A. No.
>
> Q. Was a report made out? Did you fill out a report?
>
> A. No. no.
>
> Q. Did you get any treatment when you fell backwards either on the ship or otherwise?
>
> A. No. (pp. 232-236)

The facts concerning the time-barred incidents of 1994 that were never pleaded in the Complaint were nonetheless considered by the Courts below. As to these claims for emotional distress, it will be noted that Petitioner began his employment with Arco in 1972. In 1994 and 1995, he held the position of Chief Steward. From May 2, 1994 to June 6, 1994, Perna served as Chief Steward on the ARCO ALASKA. He testified that during the voyage Captain Gray wanted more chicken and pasta in the menu and only wanted meat served two to four times each week in order to limit his budget. Contrary to the Captain's directions, Perna made up his budget to

include meat dishes every night. Perna ignored the order and continued serving beef on a daily basis. Nonetheless, Captain Gray did not alter Perna's budget, and Perna was not disciplined for violating the order.

After completing the May-June 1994, voyage, Perna took about 50 days vacation and then rejoined the ARCO ALASKA on July 21, 1994, under the command of Captain Devins. Perna served under Captain Devins until September 2, 1994, when Captain Gray rejoined the ALASKA and took command. Perna sailed under Captain Gray until October 6, 1994.

Perna continued to sail for Arco, completing two more voyages on the ARCO PRUDHOE BAY, in 1994-1995. Perna sailed under Captain Perkins on the ARCO PRUDHOE BAY until April 14, 1995, when he voluntarily left. He "gave up" because, as he perceived it, the company did not back him when he gave bad evaluations to women and minorities. He has not returned to work since.

Although Perna suggests as a reason for granting his Petition "that the Court of Appeals has misapplied one of this Court's decisions involving an interpretation of the FELA," Petitioner's own description of that case, *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532 (1994) itself suggests that the present matter does not come within the restrictions laid down in *Gottschall* and particularly the companion case of *Carlisle*, a nervous breakdown case as here, and so was properly dismissed, Petitioner notes:

> In *Gottschall*, the worker was forced to work under hot and humid conditions and when a fellow worker died from a heart attack, the body

was simply covered and left in full view of the others in the work crew for several hours while they continued to work . . .

In the other, *Carlisle*, the worker was forced to work long hours on an erratic basis, and the increased responsibilities attendant upon a promotion carried such stress that eventually he suffered a nervous breakdown.

In *Carlisle*, however, the Court entered judgment for the defendant because . . . "the core of Carlisle's complaint was that he had been given too much – not too dangerous – work to do. That is not our idea of an FELA claim" 512 U.S. at 558.

This Court . . . held that a plaintiff can recover for emotional injury under the FELA only if he/she either "sustained a physical impact" or was "placed in immediate risk of physical harm" by reason of the employee's negligence, 512 U.S. at 547-48. (Petition, pp. 11, 12)

Petitioner continues complaining that:

The "zone of danger" test . . . was applied to this case . . . even though Perna told both the District Court and the Court of Appeals that he was pursuing a claim for intentional infliction of emotional distress. Both courts nevertheless characterized the claim as one for negligent infliction of emotional distress and decided it accordingly.

Other lower courts have also applied the "zone of danger" test to what are clearly intentional acts (citations omitted) . . . A very diligent search has failed to uncover any appellate cases

> which deal with the issue of whether the intentional infliction of emotional distress is compensable under the FELA or the Jones Act. (Petition, pp. 12, 13)

Petitioner has thus failed to show how a Court of Appeals has entered a decision in conflict with the decision of another Court of Appeals or of this Court, as envisioned by Rule 10. Furthermore, Petitioner admits that all the district court cases that have considered the issue have held that a "zone of danger" test applies to intentional acts.

The Court of Appeals noted that Petitioner's Complaint did not in fact include a Count for Intentional Infliction of Emotional Distress. It stated:

> Whether an intentional infliction of emotional distress claim would fare better under the Jones Act has not been addressed by this Court and we need not address it here. Even had Perna's complaint set forth such a claim, however, the facts would not support it. . . . Although it appears that Captain Gray could be difficult to work under, the petty harassment, disagreements, and insults described by Perna do not reach an extreme or outrageous level.

It is noteworthy that Petitioner's Brief does not spell out just where he, in fact, pled a claim for Intentional Infliction of Emotional Distress.

That Petitioner admittedly failed "to develop a factual record which would enable that Court to consider an intentional infliction of emotional distress case" and repents now that "The record before this Court has not

been developed factually to a degree which would facilitate a thorough discussion of an appropriate standard for intentional infliction of emotional distress cases under the FELA and the Jones Act" (Petition pp. 14, 15) is not a reason, let alone a compelling reason, to grant the Petition. If anything, it is a clear reason why the Petition should be denied.

II. THE COURTS BELOW CORRECTLY HELD THAT PERNA'S NEW ALLEGATIONS OF PETTY OPPRESSION BY THE CAPTAIN FAILED TO STATE A CLAIM UNDER TRADITIONAL NOTIONS OF UNSEAWORTHINESS.

The present Petition for Certiorari unfortunately raises questions as to its substantiality. In his Statement of the Case, Petitioner asks this Court to call this non-final case to itself because:

> Captain Gray asked him (Perna) to stop putting beef on the menu for budgetary reasons. The Captain wanted chicken and pasta served to the crew because they were cheaper. Perna refused the Captain's request because he wanted to give the crew as wide a variety as he could, for morale reasons . . . The Captain later remonstrated with Perna for having told the Chief Engineer.
>
> Perna also had some difficulty with an insubordinate subordinate who continued to eat shrimp after he was told he was not allowed to do so (Petition p. 7).
>
> At the conclusion of the (second) tour Captain Gray evaluated Perna's performance . . . "Joe works real hard at this. He is very concerned

> about variety, food preparation and presentation. Food comes out hot and has eye appeal . . . Joe demonstrates high quality cooking skills. Hot and fresh are high on his list of concerns . . . Joe has a strong desire to perform well."
>
> The Captain's criticisms dealt mostly with Perna's supervisory skills . . . "My perception is that at times he (Perna) has little or no control of his department. I have received negative comments from the other three members of his department." (Petition p. 7).

As to Captain Gray, Perna brings up that Gray supposedly failed the U. S. Coast Guard exam for Master the first time he took it and that he was only in the middle grade for an Arco captain (Petition, pp. 8, 9).

The Court of Appeals noted:

> As an absolute liability regime, unseaworthiness indeed encompasses more than the negligence – grounded Jones Act. It does not follow, however, that the unseaworthiness doctrine is limitless in scope . . . The idea that purely emotional injury claims must be bounded in some manner is hardly controversial . . . because Perna failed to allege any physical impact or "zone of danger" related to his emotional injury, the District Court was correct in finding for Arco in the unseaworthiness claim.

Petitioner himself admits:

> This Court has not decided what marks the boundaries of a seaman's fitness except in the *Boudoin* assault context. The lower courts have generally required the use of a deadly weapon such as a knife e.g. *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) or the use of something else in a

> savage manner, e.g., *Wiradihardja v. Bermuda Star Line*, 802 F.Supp. 989 (S.D.N.Y. 1992) (a bottle of catsup). Mere drunken assaults are not enough, e.g., *McKinley v. Afrom Lines (USA) Co., Ltd.*, 834 F.Supp. 510 (1993) . . .
>
> In *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967), this Court said that an "incompetent" seaman would render the vessel unseaworthy, but the facts of that case dealt with an inadequate number of seamen rather than an incompetent one. (Petition pp. 16, 17).

In *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336 (1955) to which Petitioner refers, plaintiff oiler was injured by a maintenance man Gonzoles who, during the course of a night's drinking party, went to plaintiff's room and took a bottle of brandy from under plaintiff's bed and attacked plaintiff. The District Court found that Gonzales was "a person of dangerous propensities, and proclivities" "a person of violent character, belligerent disposition, excessive drinking habits disposed to fighting and making threats and assaults" and held that the shipowner breached its warranty of seaworthiness. The Court of Appeals reversed. The Supreme Court granted certiorari to resolve a seeming conflict between that opinion (Fifth Circuit) and *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2nd Cir. 1952), decided by the Second Circuit. In *Keen*, it was held that a crewman who tried to murder one of his fellows with a meat cleaver was not equal in disposition to those of his calling. The Supreme Court reinstated the district court's judgment in *Boudoin*.

In any event, it does not appear that any Court has carried the doctrine so far as to find a ship unseaworthy

because the Captain had an alleged sullen personality, absent some kind of vicious physical assault.

The procedural posture of the present case also counsels against granting the Petition for Certiorari. The present matter is still ongoing, remanded to the district court for a trial on the maintenance and cure issue.

Once again, Petitioner fails to spell out the compelling reason why this Court should call this non-final case to itself under Rule 10. There is no split of authority among the Circuit Courts of Appeal on whether a "zone of danger" test will also govern unseaworthiness claims based on emotional distress. Rather, the only Circuits that have considered the issue have so required: namely, the Sixth Circuit in *Szymanski v. Columbia Trans. Co.*, 154 F.3d 591 (6th Cir. 1998) and the Third Circuit in the present matter for the reasons ably expressed in the Opinions of the Courts below. Likewise, Petitioner has failed to spell out any departure from a decision of this Court on the unseaworthiness issue. Granting the Petition would encourage piecemeal litigation; likewise, the significant difficulties attendant to the present Complaint that referred to a specific incident on April 14, 1995 which Petitioner later identified but then disavowed and the beyond-the-statute-of-limitation references to emotional distress incidents about pasta and shrimp in 1994 and the Petitioner's failure to move to amend his Complaint to add these references counsel against granting Certiorari.

CONCLUSION

For all the above reasons, it is respectfully submitted that there is no compelling Reason under Rule 10 to grant the present Petition from an Interlocutory Order. The Petition should be denied.

Respectfully submitted,

DANTE MATTIONI, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH C. PERNA	:	CIVIL ACTION
Vs.	:	NO. 97CV-4326
ARCO MARINE, INC.	:	

COMPLAINT
(WAIVER OF FILING FEE 28 U.S.C. SECTION 1916)
FIRST CAUSE OF ACTION
JURY TRIAL DEMANDED
(Filed Jun. 30, 1997)

Plaintiff hereby claims of the defendant a sum in excess of One Hundred Thousand Dollars ($100,000.00) in damages upon the following causes of action:

1. Plaintiff is a seamen.

2. This action is brought pursuant to the Maritime Law of the United States as modified by the Jones Act, 46 U.S.C. § 688 et. seq.

3. At all times material hereto, defendant, was doing business in Philadelphia, Pennsylvania.

4. At all times material hereto, plaintiff was in the employ of the defendant as a member of the crew of defendant's vessel "ARCO ALASKA" at the rate of pay and for the terms as get forth in his contract of employment.

5. On or about April 14, 1995 plaintiff suffered injuries while under the employment of defendant.

6. Plaintiff's injuries were caused by the negligence of the defendant, by its agents, servants, workmen and employees, by the unseaworthiness of the ARCO ALASKA, and by the defendant's breach if its obligations under the circumstances.

7. Solely by reason of the negligence of the defendant and the unseaworthiness of its vessel, plaintiff sustained personal injuries.

WHEREFORE, Plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

SECOND CAUSE OF ACTION

IN ADMIRALTY

Plaintiff claims of defendant maintenance and cure and wages in such amount as may be determined by the Court upon the following cause of action:

8. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 7 inclusive of this Complaint, with the same force and effect as if fully set forth and repeated herein.

9. Plaintiff, by virtue of his services upon the said drillboat, claims maintenance and cure and wages for the period of this disability in an amount which to your Honorable Court shall deem just and proper upon the trial of this cause.

10. All and singular, the premises contained herein are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, plaintiff prays that judgment be entered against the defendant for such maintenance and cure and wages as the Court may determine to be due and owing upon the trial of this cause, and for such interest, costs and counsel fees as the Court may deem just and proper.

E. ALFRED SMITH & ASSOCIATES

By: /s/ E. Alfred Smith
ALFRED Smith
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ATTORNEY FOR PLAINTIFF